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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 22

ALL STATES FREIGHT, INC., ET AL., APPELLANTS

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 39–46) is reported at 221 F. Supp. 370. The report of the Interstate Commerce Commission (R. 9–29) is reported at 315 I.C.C. 419.

JURISDICTION

The final judgment of the district court was entered on September 16, 1963 (R. 50–51). Notice of appeal was filed on November 2, 1963 (R. 51–53), and on March 30, 1964, this Court noted probable jurisdiction (R. 386).[1]

[1] The United States and the Interstate Commerce Commission, defendants in the proceeding below, did not appeal.

QUESTIONS PRESENTED

(1) Whether the court below erred in holding that the requirement of Section 1(6) that railroads establish reasonable classifications of property for rate-making purposes is satisfied by the maintenance of class rates, and does not apply to lower commodity rates at which most freight moves.

(2) Whether the court below erred in holding that the National Transportation Policy prohibits the Commission from considering the relative value of the transportation service in determining the lawfulness of rates.

STATUTES INVOLVED

Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4), provides, in part:

> It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *

Section 1(5) of the Act, 49 U.S.C. § 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 1(6) of the Act, 49 U.S.C. § 1(6), provides, in part:

> It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, * * * and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

The National Transportation Policy, 49 U.S.C. preceding § 1, provides, in part:

> It is hereby declared to be the national transportation policy of the Congress * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices * * *

STATEMENT

The New Haven Railroad, and certain other rail carriers serving New England, published reduced all-commodity rates from specified New England origins to Chicago and St. Louis. The Commission permitted them to become effective on July 16, 1959. The rates apply indiscriminately to all articles named in the railroads' Uniform Freight Classification, with certain designated exceptions; they are available either for straight carloads (*i.e.*, shipments of a single commodity) or mixed carloads; they are scaled to weight minima ranging in 10,000-pound intervals from 20,000 pounds to 70,000 pounds; and they vary in level from 45 percent (for 20,000-pound shipments) to 19 percent (for 70,000-pound shipments) of the first class rate.

Upon protest, these and related rates were set down for investigation. The hearing examiner found them not shown to be just and reasonable, stating (R. 84) that "since these rates, dropping as low as 19 percent of first-class, are not made subject to a mixing rule, and are made without regard to the value of the articles transported or other usual transportation considerations, the examiner finds, and so concludes, that they tend to vitiate, and thereby undermine, the uniform freight classification in violation of section 1(6) of the [Interstate Commerce] act, and would thereby inevitably result in jeopardizing the entire rate structure."

Division 2 of the Commission reached a contrary conclusion, although Commissioner Freas, dissenting, declared (R. 103):

> Although special circumstances may provide justification, "all-freight" rates applying on straight shipments are in my opinion ordinarily highly undesirable.
>
> Here the desire to meet competition is relied upon to justify the proposal. Yet the record is clear that rates as low as those proposed are not necessary to meet the competition.

The protestant, Eastern Central Motor Carriers Association, Inc., joined by several motor-carrier intervenors,[2] petitioned the full Commission for re-

[2] All States Freight, Inc., Chicago Express, Inc., Eastern Express, Inc., Long Transportation Co., W. L. Mead, Inc., Ramus Trucking Line, Inc., Roadway Express, Inc., Spector Freight System, Inc., The Western Express Co. and Wilson Freight Forwarding Co., by order of the Commission entered June 9, 1961, were granted leave to intervene.

consideration of the Division 2 report and order, and on December 28, 1961, the Commission entered the report and order here under review. With three members dissenting, the Commission reached the same conclusion as had the hearing examiner and found the rates to be unjust and unreasonable. It stated (R. 15):

> The rates here under investigation * * * apply not only on mixed but also on straight shipments of numerous commodities which would otherwise be subject to higher rates. Thousands of commodities are included in this sweeping adjustment without relation to classification principles, and without regard to the destructive effect which the proposed rates would have upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. If not restricted to reasonable mixtures, such rates could, and no doubt would, break down these rate structures, to the detriment of carriers and shippers alike. The evidence is clear that such a result would follow approval of the proposed rates. In these circumstances, the rates must be condemned as constituting a destructive competitive practice in contravention of the national transportation policy, and also as in violation of section 1(6) of the act.

The three-judge district court set aside the Commission's order and enjoined its enforcement (R. 50–51). It held that the Commission's decision rested on an erroneous interpretation of Section 1(6) of the Act (which requires railroads "to establish, ob-

serve, and enforce just and reasonable classifications of property for transportation"); that the purpose of that section was "to protect shippers by controlling the maximum charges for transportation of commod "; that this purpose "is fulfilled by the maintenance in being of class rates even though competitive conditions lead to the furnishing of service through variously constructed rates at lower charges"; and that there is "no sound reason for so interpreting § 1(6) as to prohibit such competitively compelled departures from classifications, within the established maxima, absent some other violation of the Act than the mere departure from the classification" (R. 44, 221 F. Supp. at 374).

The court held, moreover, that the Commission had invoked Section 1(6) "as a means of preserving a basis for the 'value of service' concept in ratemaking * * *, in a desire to hold fast to a past which has already slipped away beyond our reach." (R. 45.) Whatever may have been the utility of this factor in transportation pricing "in the development of railroads and commercial and agricultural enterprises in the undeveloped West at a time when the existing railroads were powerful monopolies", continued the court, "[t]he continuing application of the principle is * * * contrary to the letter and spirit of the National Transportation Policy." *Ibid.*

ARGUMENT

INTRODUCTION AND SUMMARY

A three-judge district court has set aside an order of the Interstate Commerce Commission cancelling the New Haven's all-commodity rates on the ground that

they contravene Section 1(6) of the Act (requiring that carriers maintain "just and reasonable classifications of property for transportation"). A number of motor carriers which compete with the New Haven have appealed to this Court. The Commission, however, entertaining some doubt as to the adequacy of its findings, elected not to appeal; instead, it reopened the proceedings for further consideration and hearing.[3] The United States also concluded that an appeal would be inappropriate in the circumstances. This brief is filed to advise the Court of the government's views on the merits.

We submit that the court below erred in holding that Section 1(6) is relevant only to the validity of "class" rates, and has no application to "commodity" rates. Today the great bulk of the nation's carload tonnage moves on commodity rates—rates applicable to particular commodities and to particular points of origin and destination—rather than class rates. The court below held, in effect, that a rail carrier fulfills its duty under Section 1(6) merely by maintaining on file a satisfactory schedule of class rates, even though those rates are little used; and that while the commodity rates, which *are* used, must comply with other provisions of the Act, they need not conform to the requirement of "just and reasonable classification." As we show in Point I, this result is warranted neither by the language nor by the history of the Act and is contrary to long-standing administrative practice.

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[3] Pending the resolution of the case in this Court, the Commission's further hearing has been postponed.

Even before the enactment of Section 1(6), as part of the Mann-Elkins Act of 1910, the Commission regularly applied classification standards in passing on commodity rates. Since the declared purpose of Section 1(6) was to confirm the Commission's authority in the area of classification, Congress impliedly ratified the existing practice as to commodity, no less than class, rates. Subsequent to 1910, the Commission has continued to insist upon just and reasonable classifications in commodity-rate cases. And the standards it has applied in dealing with all-commodity rates represent no departure from this settled practice.

The court further erred, we believe, in suggesting that the continued application of the value-of-service principle as a criterion in classifying freight and designing rates would be contrary to the letter and spirit of the National Transportation Policy. As we develop in Point II, while the rise of intermodal competition necessitates a somewhat more flexible application of the value-of-service concept, it by no means compels its abandonment. Nor does the National Transportation Policy outlaw this familiar rate-making criterion. Indeed, several provisions of the Act affirmatively authorize the Commission to take into account the value of the commodities to be shipped, as well as other factors bearing upon the elasticity of demand for the carrier's service and the effect of a given rate change upon the carrier's overall revenue requirements.

The appellant motor carriers apparently take the position that an all-commodity rate which is appli-

cable to straight shipments, as well as mixed shipments, and which would supersede virtually all of the carrier's existing commodity and class rates, necessarily contravenes Section 1(6). They request, therefore, that the case be remanded to the court below with instructions to dismiss the complaint. We do not agree that an all-commodity rate having the above characteristics is *per se* in violation of Section 1(6). And the Commission is doubtful as to the adequacy of its findings to support the conclusions (a) that the proposed classification is not a "just and reasonable" one and (b) that the requested rate adjustment would constitute a destructive competitive practice. Accordingly, the government suggests that the cause be remanded to the Commission for additional findings relative to these issues.

I. SECTION 1(6) OF THE INTERSTATE COMMERCE ACT REQUIRES REASONABLE CLASSIFICATIONS OF FREIGHT IN THE MAKING OF COMMODITY RATES, NO LESS THAN IN THE MAKING OF CLASS RATES

Section 1(6) of the Interstate Commerce Act requires railroads "to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed."[4] The court below held that this statutory mandate is applicable only for the purpose of constructing "class" rates and has no bearing on the validity of "commodity" rates such as those involved here. That restrictive interpretation, we submit, has no basis either in the language or the history of the

[4] Section 216(b) imposes a comparable duty upon motor carriers.

statute, and is at odds with long-standing administrative practice.

The distinction between "class" rates and "commodity" rates is fundamental to an understanding of this case. Class rates are the foundation of the railroad rate structure; they apply to all articles of commerce in the absence of commodity rates or other rate concessions. Flood, *Traffic Management* 138 (1963); Morton and Mossman, *Industrial Traffic Management* 37 (1954). The categories to which they relate are established by the railroads' Uniform Freight Classification, which organizes some 8,000 commodities into 31 classes or "ratings." For each of these groupings a companion tariff prescribes the appropriate "class" rate, ranging from 13 percent (class 13) to 400 percent (class 400) of the first class rate (class 100). Commodities are assigned to these categories on the basis of a wide variety of characteristics bearing upon the cost of, and also the demand for, the transportaton service.[5]

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[5] These transportation characteristics were listed by the Commission as follows, in *Motor Carrier Rates in New England*, 47 M.C.C. 657, 660–61:

The characteristics of the commodities which must be considered in fixing classification ratings are generally as follows:

1. Shipping weight per cubic foot.
2. Liability to damage.
3. Liability to damage other commodities with which it is transported.
4. Perishability.
5. Liability to spontaneous combustion or explosion.
6. Susceptability to theft.
7. Value per pound in comparison with other articles.
8. Ease or difficulty in loading or unloading.
9. Stowability.

From the earliest days of railroad rate-making, however, the carriers have also utilized rates which are applicable only to specific commodities and to movements between specifically named points. These "commodity" rates are generally somewhat lower than the class rates which would otherwise apply and are determined "with reference to all the conditions surrounding the transportation of the particular articles between the particular points." *The Mississippi River Case,* 28 I.C.C. 47, 63; *Railroad Commission of Louisiana* v. *A.H.T. Ry. Co.,* 48 I.C.C. 312, 369. While the original purpose of these rates was to encourage the movement, in large quantities, of low-rated bulk commodities such as coal and grain, they have increasingly served the railroads as a competitive pricing device to prevent diversion of many types of traffic to private or for-hire motor carriage. As a

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10. Excessive weight.
11. Excessive length.
12. Care or attention necessary in loading and transporting.
13. Trade Conditions.
14. Value of service.
15. Competition with other commodities transported.

Accord: *Class Rate Investigation, 1939,* 262 I.C.C. 447, 508; *Investigation and Suspension Docket No. 76,* 25 I.C.C. 442, 472–73 and cases cited therein: *Procter & Gamble* v. *C.H. & D. Ry. Co.,* 9 I.C.C. 440, 482. All of these transportation characteristics are taken into consideration in rating a particular freight, and no one of them is controlling. *Vacuum Cleaner Manufacturers Assn.* v. *Atchison, T. & S.F. Ry. Co.,* 276 I.C.C. 783, 792; *Nashville Traffic Bureau* v. *L. & N. R.R. Co.,* 68 I.C.C. 623, 626; *McCrory Stores Corp.* v. *Director General,* 55 I.C.C. 421, 424.

consequence of the rapid growth of intermodal competition, by far the major portion of the nation's carload tonnage now moves on commodity rates; relatively little traffic still travels on class rates (R. 42, 221 F. Supp. 373; see Van Metre, *Industrial Traffic Management* 28 (1953)).

The court below held that a rail carrier fully discharges its duty under Section 1(6) merely by maintaining on file a satisfactory system of class rates, albeit those rates are seldom used and exist primarily on paper. It ruled, in short, that while the commodity rates must comply with other provisions of the Act—*i.e.*, must be just and reasonable, non-discriminatory, etc.—they need not conform to the classification requirements of Section 1(6).

This construction draws no support from the language of the statute, which speaks in unqualified terms of "classifications of property * * * with reference to which rates * * * are or may be prescribed," and which prohibits and declares unlawful "every unjust and unreasonable classification." Nor is the court's conclusion required by the meaning of the word "classification." Classification is simply the pragmatic process by which articles of commerce are compared, grouped, and differentiated for the assessment of transportation charges. As such, it is an essential element in all rate-making. Colquitt, *The Art and Development of Freight Classification* 20 (1956) Sharfman, *The Interstate Commerce Commission*, III–B, 476–477 (1936). It matters not whether the articles to be classified are brought together within a group comprising a single commodity, many commodities, or, as here, all commodities; nor is

it material whether the group takes a commodity rate, a class rate, or an all-commodity rate. In all of these cases Section 1(6) demands that differences and similarities between and among the articles of shipment, whether in their transportation characteristics or in the circumstances attending their movement, must be reasonably reflected in the rates.

The court's unnatural reading of Section 1(6) is refuted, rather than sustained, by the legislative history. The purpose of this provision, enacted as part of the Mann-Elkins Act of 1910, was to confirm the authority of the Commission to pass upon the justness and reasonableness of a carrier's classification of property for transportation. S. Rep. 355, 61st Cong., 2d Sess. 4 (1910), H. Rep. 923, 61st Cong., 2d Sess. 4 (1919); 45 Cong. Rec. 4578, 5142, 6900, 8382 (1910). Congress was undoubtedly aware that the Commission had long exercised such authority in passing upon commodity rates, repeatedly insisting that (competitive conditions being equal) similar articles take the same commodity rate and dissimilar articles take different commodity rates. Thus, in the early landmark case of *Coxe Brothers & Co.* v. *Lehigh Valley RR. Co.*, 4 I.C.C. 535, 560:

> Ordinarily there is no better criterion for reasonable charges than that which is in proportion to the service rendered; and if the cost and expense of the carrier was the only test of a reasonable charge the claim might well be made that all coals should be classed together as one freight and be subject to the same transportation charge.
>
> Carriers in making separate classifications, or rates for different coals, take into considera-

> tion not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the most valuable anthracite for domestic and special uses and cause its large consumption in less distant markets; the shorter distance from the mines to the principal markets rendering the transportation proportionally more expensive, and the necessity for so apportioning the transportation charges between the anthracite of different sizes and values that the more valuable may bear the greater charge.

Conversely, in *Stowe-Fuller Company* v. *Pennsylvania Co.*, 12 I.C.C. 215, 220, the Commission refused to countenance the assignment of distinct rates to three sub-classes of brick, pointing out that "[c]lassification must be based upon a real distinction from a transportation standpoint; and we can find no such distinction between these three classes of brick, which are made of the same material and come out of the same kiln, as justifies a difference in rates." And in several other commodity-rate proceedings prior to 1910, the Commission considered the reasonableness of the carrier's proposed freight classification. *Metropolitan Paving Brick Co.* v. *Ann Arbor R.R. Co.*, 17 I.C.C. 197, 201–202; *Duluth Shingle Co.* v. *Duluth, S.S. & A. R. Co., et al.*, 10 I.C.C. 489, 501; *McGrew* v. *Missouri Pac. Ry. Co.*, 8 I.C.C. 630, 641; *In re Excessive Freight Rates, etc., on Food Products*, 4 I.C.C. 48, 67–68. In enacting Section 1(6), Congress impliedly approved the settled practice.

Since the enactment of that section, the Commission has consistently scrutinized the reasonableness of

freight classifications in passing upon commodity rates. Its rationale for doing so was perhaps best stated in *Rates on Lumber and Lumber Products,* 52 I.C.C. 598, 602:

> A classification of given articles is effected by a determination of their rate relationship. In a measure this is true when articles are grouped together under a commodity description in a commodity tariff as well as when they are included in official, western, or southern classification. In each case classification factors should be considered in determining what articles should be grouped. The groupings in the classifications, of course, have much wider application and, beside providing that certain articles should take the same rates, also provide that other articles should take higher or lower rates, as the case may be.

In response to the carriers' contention that it would be inappropriate for the Commission to concern itself with the relationships of the affected items of traffic, since they moved predominantly on commodity rates, rather than on class rates, the Commission declared (52 I.C.C. at 604):

> While it is true that commodity rates are generally regarded as designed to take care of particular movements, the circumstances and conditions surrounding which require a departure from the normal adjustment as provided by the classifications and the class rates, it is also true that as to many commodities the movement as cc nmodity rates is to such an extent predominant that the class rates can no longer be regarded the normal adjustment. When that is the case, *it is desirable to ascertain whether or*

> *not a standardization of rate relationships such as the classifications were intended to afford can again be effected, upon a new basis different from that found inadequate in the existing classifications.* [Emphasis added.]

After considering the various transportation characteristics, the Commission promulgated the appropriate groups for the commodities in question, concluding (52 I.C.C. at 628) that "in making commodity rates, the rate-maker must observe the law which requires that rates shall be reasonable in and of themselves, and also reasonable by relation." For later views to the same effect, see *Transit of Furfural Residue at Various Points*, 322 I.C.C. 794, 806, and cases cited therein; *Bunge Corp.* v. *Ann Arbor R. Co.*, 283 I.C.C. 617, 627; *Forrestal* v. *Abiline & S. Ry. Co.*, 263 I.C.C. 457; *Minneapolis Hide & Tallow Co.* v. *Chicago & N.W. Ry. Co.*, 258 I.C.C. 355, 360–61; *National Paving Brick Mfrs. Asso.* v. *A. & V. Ry. Co.*, 68 I.C.C. 213, 217.

The Commission's approach in dealing with all-commodity rates—*i.e.*, charges applicable to shipments of all goods (with designated exceptions) between specific points—represents no departure from sound classification principles. This type of rate was introduced in the early 1930's to enable shippers to put together a full carload shipment of various commodities—commodities which, if priced separately, would have been subject to the relatively higher rates applicable to less-than-carload quantities. Thus, the all-commodity rates made available to shippers the cost savings realized by the carrier through its ability

to transport given tonnage in a single fully loaded boxcar, instead of several partly loaded boxcars. In keeping with this purpose, the Commission has generally restricted the application of all-commodity rates to shipments of mixed articles and even then has insisted that they reflect the transportation characteristics of the predominant component of the mixture.[6] On those few occasions on which it has approved all-freight rates applicable to straight-carload shipments (shipments of a single commodity) it has specifically noted that the rates would not displace the class or commodity rates otherwise applicable, either because the latter rates were at a lower level or because the particular articles did not move in carload quantities.[7] Thus, in no instance has the Commission sanctioned an all-freight charge which, like the ones at issue here, would have undercut the ex-

[6] Accord, *Freight, All Kinds, from Chicago to Columbus, Indiana*, 308 I.C.C. 517, 519; *Freight, All Kinds, Between Buffalo and Detroit*, 303 I.C.C. 63, 64; *Freight, All Kinds, from Toledo, Ohio, to Chicago, Illinois*, 302 I.C.C. 751, 752; *Merchandise, Chicago and Cincinnati, Indianapolis*, 64 M.C.C. 791, 797; *Various Commodities from the Twin Cities to Iowa*, 63 M.C.C. 663, 666; *Washing Machines and Merchandise, Dennis Truck Line*, 53 M.C.C. 441, 447.

[7] *All Freight to Pacific Coast*, 248 I.C.C. 73, 81, upon which the court below chiefly relied, was such a case. For while the all-commodity rates there approved were applicable to straight shipments, as well as mixed shipments, the Commission explicitly noted (at p. 87) that the proposed rates were no lower than the existing carload rates for the individual commodities and that this class of merchandise was not ordinarily in carload quantities (at p. 75). See also, *Freight in General From Colorado to Utah and Idaho*, 253 I.C.C. 219, 220; *All Freight From Butte, Mont., to Spokane, Wash.*, 251 I.C.C. 291, 295.

isting class or commodity rate structure; indeed, it has often condemned such rates.[8]

To be sure, any all-freight rate cuts across ordinary commodity classifications, in that it makes the same rate available for combinations of high-rated articles and for combinations of low-rated items alike. But so long as all-commodity rates are tailored to their legitimate purpose—that is, are confined to reasonable mixtures, adhere closely to the average or representative carload rate for the items covered, and therefore supplement, rather than subvert, the rate structure as a whole—they may fairly be deemed to constitute what the Commission described as a "reasonable separate category of classification" (R. 15).

In contrast, the rates at issue here would apply on straight as well as mixed shipments and would sweep within their ambit thousands of commodities, the great majority of which would otherwise move at higher carload commodity and class rates. Unlike the appellant motor carriers, we do not say that such rates cannot in any circumstances satisfy the standard of "reasonable classifications" laid down by Section 1(6). They are, however, radically different from any which the Commission has approved in the past and only in extraordinary circumstances could

[8] *All Freight Between Portland and Seattle*, 238 I.C.C. 729, 733–734; *Freight, All Kinds, Kansas City, Mo.-Kans. to Nebraska*, 310 I.C.C. 321, 325; *All Freight, Straight Carloads, to and from the South*, 258 I.C.C. 579, 581; *All Freight Rates to Points in Southern Territory*, 253 I.C.C. 623, 633; *All Freight Between Harlem River, N.Y., and Boston*, 234 I.C.C. 673, 675; *Freight Forwarding Investigation*, 229 I.C.C. 201, 251, 256, affirmed, 232 I.C.C. 175.

be shown to constitute "just and reasonable classifications."

II. IN APPLYING SECTION 1(6) THE COMMISSION MAY APPROPRIATELY TAKE INTO ACCOUNT VALUE-OF-SERVICE CONSIDERATIONS

In addition to ruling that Section 1(6) was inapplicable to this case, the court suggested that the Commission could in no event rely upon so-called value of service principles. It stated (at 44–45):

> It would appear that the Commission here invokes § 1(6) as a means of preserving a basis for the "value of service" concept in ratemaking referred to above, in a desire to hold fast to a past which has already slipped away beyond our reach.
>
> This "value of service" principle was useful in the early years of the Interstate Commerce Act in requiring the more prosperous East to assist in the development of railroads and commercial and agricultural enterprises in the undeveloped West at a time when the existing railroads were powerful monopolies. In his opinion in *New York, New Haven & Hartford RR* v. *United States,* 199 F. Supp. 635, 642 (1961), vacated 372 U.S. 744, Judge Hincks described the value of service concept as among the "official discriminations, hallowed and encrusted by time and inertia (which) now pervade the rate structure." The continuing application of the principle is, however, contrary to the letter and spirit of the National Transportation Policy * * *.

It is not clear whether these remarks were intended merely to buttress the holding that classification standards are inapplicable to commodity rates, or

whether they were also meant to serve as the basis for an alternative holding that the proposed rates would not violate Section 1(6) even if it were applicable. In any case, the Commission believes that the court's strictures as to the relevancy of value-of-service would seriously hamper it both in its administration of Section 1(6) and in its exercise of the minimum rate power. Accordingly, in light of our suggestion that this case should be remanded to the Commission, we think it important to address ourselves to the court's comments. We submit that its sweeping condemnation of the value-of-service concept is unwarranted and that neither the rise of intermodal competition nor any provision of the Act requires the abandonment of this rate-making criterion.

1. Before turning to the applicable statutory provisions, it will be helpful to state clearly what the value-of-service concept entails. "Value of service" has been variously defined as a measure of the elasticity of the demand for the carriers' services (Way, *Elements of Freight Traffic* 123 (1956)); as "the highest charge that can be levied without preventing a shipment from moving" (Locklin, *Economics of Transportation* 144 (5th Ed. 1960)); and as an index of the shipper's "willingness to ship via a given mode at different line-haul rates" (Senate Commerce Committee, *National Transportation Policy* 409, S. Rep. 445, 87th Cong., 1st Sess. (the Doyle Committee Report)). In short, it is a rate-making principle which focuses upon demand rather than cost, and which requires that the rates for each class of traffic be fixed with an eye to "what the traffic will bear." Traditionally, the value

of a transportation service was thought to be a direct function of the value of the commodity to be shipped; indeed, the two "value" concepts were often treated as synonymous. Thus it has long been a truism that, other things being equal, articles of high value take a higher rate than those of lesser value. This "discrimination" is sometimes rationalized on the ground that the shipper of "diamonds" derives a more valuable benefit from the carriage than does the shipper of an equal weight of "coal." The true justification, however, is that the transportation charge for an expensive article, even when very high, is so small in relation to the market price of the article at destination, that it does not appreciably restrict the sale of the commodity or, therefore, the movement of the traffic (*i.e.*, the demand for the transportation service). Conversely, there are many low-priced commodities (coal, grains, etc.) which will not move at a rate high enough to cover the fully distributed costs of transporting them. Thus, if the railroads are to operate profitably, they must exact from the high-rated traffic a disproportionate contribution to their overhead burden, and to that end must charge such traffic a rate substantially in excess of the fully distributed costs of the transportation.

The growth of intermodal competition has, of course, made it increasingly difficult for the railroads to command this contribution from high-rated traffic. In addition, it has highlighted certain implications of the value-of-service concept which tended to be obscured in the days when railroads as a class enjoyed a transportation monopoly. Traditionally, for exam-

ple, there was no occasion to differentiate between the value of transportation generally (to the shipper of a given commodity) and the value of a particular carrier's service. It has now become clear that while the maximum charge at which a shipper will prefer transportation to no transportation may depend chiefly upon the price of the commodity to be shipped, he will place no higher "value" upon the service of a particular rail carrier than the price at which he can obtain an alternative service of comparable quality. Thus, Commission approval of rail-rate adjustments designed to meet the competition of motor carriers is not so much a departure from value-of-service formulae as a recognition that the relative value of rail service is declining.

Similarly, with the development of motor-carrier competition, and the attendant increase in the elasticity of demand for rail service, it has become evident that a competitive rate reduction for high-rated traffic, though decreasing the carrier's return per transportation unit, may generate enough additional volume to produce an increase in the overall net revenues derived from the traffic as a whole. Such an adjustment would be entirely in keeping with the objectives of the value-of-service approach, even though it might result in a lower rate for some articles than for others of equal value.

The point to be stressed is that the competitive considerations which have gained prominence in recent years, far from compelling the abandonment of the value-of-service principle, are themselves germane to its proper application. Nor does the pervasiveness of

intermodal competition make it any less important, in applying Section 1(6), to insist that differences in the transportation characteristics of various commodities be reflected in their classification for rate purposes. Indeed, the degree to which the movement of any commodity is affected by truck competition is itself one of the transportation characteristics which differentiates that commodity from, or likens it to, others. Seldom does motor-carrier competition have a uniform impact upon all commodities moving between specified points. Hence a railroad cannot justify an across-the-board reduction of all its rates merely by demonstrating that the reduction is competitively required as to *some* of its traffic. Still less can it defend on those grounds the displacement of its entire rate structure by a single all-commodity rate such as the one involved here. In each case the Commission must examine and compare the circumstances attending the movement of the particular commodities in question in order to determine the proper relationship between the rates for those commodities.

2. In light of this analysis, we turn to the lower court's conclusion that continued application of the value-of-service concept is "contrary to the letter and spirit of the National Transportation Policy" (R. 45). Adopted as part of the Transportation Act of 1940, the National Transportation Policy (49 U.S.C., preceding § 1) requires that each mode of transportation be permitted to assert whatever "inherent advantages" of cost or service it may possess. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83. The same policy is expressed more explicitly in Sec-

tion 15a(3), one of the 1958 amendments to the Act, which provides in part that "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." See *Interstate Commerce Commission* v. *New York, New Haven & Hartford Railroad Co.*, 372 U.S. 744. Those provisions do not reflect in any way upon the validity of the value-of-service principle. They merely establish that a proposed rate reduction *which benefits the proponent,* and does not deprive any competing mode of an inherent advantage of its own, may not be disallowed merely to protect the traffic or the rate structure of another form of carriage. For if "a carrier is prohibited from establishing a reduced rate *that is not detrimental to its own revenue requirements* merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service" [emphasis added]. *New Haven Railroad, supra,* 372 U.S. at 759. But value-of-service has nothing to do with the protection of "other" carriers; its purpose, rather, is to safeguard the rate structure and the revenue-earning capacity of the proponent carrier itself. A rate adjustment which genuinely asserts an "inherent advantage" of the proponent, and would enable it to obtain from the traffic in question a more adequate contribution to its overhead burden, would be wholly consistent with the value-of-service concept. Conversely, the only rate reductions inconsistent with it are those which *injure* the proponent in that they fail

to generate enough additional volume to offset the revenue loss per unit of traffic; and such a reduction could scarcely be viewed as the assertion of an "inherent advantage."

That the "inherent advantage" factor is consistent with value-of-service rate-making is clearly indicated by remarks of Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce and Foreign Commerce, in the course of the debates on the Transportation Act of 1940. Senator Wheeler stated (86 Cong. Rec. 11290):

> Let us suppose, for example, a situation where competing railroads, coast-wise steamship lines, and trucks are all maintaining, to their own and shippers' satisfaction in general, a comparatively high level of freight rates on various packaged goods of high value, and some carrier, for the sake of a temporary advantage, undertakes to cut these rates. If this must be allowed, ultimately all the competing rates will be reduced and a hole created in carrier revenue which may make it necessary to increase rates on traffic less able to stand the burden. We think that it should not be allowed, and that the Commission should be in a position to prevent such a train of events by exercise of its authority over the minimum rates.

Moreover, several provisions of the Interstate Commerce Act affirmatively sanction the use of value-of-service. Thus, the Hoch-Smith Resolution (49 U.S.C. 55), adopted in 1925 and still in effect, directs the Commission, in making necessary changes and adjustments in the structure of carrier rates, to "give due regard, among other factors, to the general and comparative levels in market value of the various classes

and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation." See *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658, 664, 667.

Similarly, Section 15a(2) (49 U.S.C. 15a(2)) provides that "the Commission shall give due consideration, among other factors, to *the effect of rates on the movement of traffic* by the carrier or carriers for which the rates are prescribed; * * * and to *the need of revenues* sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." [Emphasis added.] That provision, originally enacted in 1933, was given its present form by the very 1940 legislation which also articulated the National Transportation Policy.

And Section 15a(3)—the same provision which prohibits the holding up of a rail carrier's rates to protect the traffic of another mode of transportation—also directs the Commission, in exercising its minimum rate power, to "consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable." Thus, while forbidding the Commission to engage in "umbrella rate-making" or to act as a "giant handicapper" (see *New Haven, supra,* 372 U.S. at 758), Section 15a(3) affirmatively admonishes it to take into account the elasticity of demand for the railroad's own services, and hence, by implication, the impact of any rate change upon its net revenues from the traffic in question.

We note, finally, that the continuing validity of the value-of-service concept was recognized by this Court

both in *King* v. *United States*, 344 U.S. 254, 264 where it held that the Commission may give weight to passenger revenue deficits in prescribing freight rates sufficient to meet over-all revenue needs, and in *B. & O. R. Co.* v. *United States*, 345 U.S. 146, 148, holding that the Commission could prescribe noncompensatory rates on certain vegetables where there was no claim that "the challenged rates will make any one of the complaining railroads operate its entire business at a loss, or even carry all fresh vegetables at a loss."

In the long run, competitive pressures, chiefly those exerted by unregulated motor carriers, may force the rates of regulated carriers, both rail and motor, to a level at (or occasionally even below) fully distributed cost. It scarcely follows, however, that the Commission must immediately adopt cost as the sole criterion of reasonable rates and classifications.[9] What is

[9] Even the most outspoken critics of the traditional concepts of rate-making, while maintaining that "regulatory action to maintain the present value-of-service rate structure is clearly undesirable for both the carriers and the consuming public," do not advocate "the complete elimination of price discrimination [value-of-service rate-making]." Meyers, et al., *The Economics of Competition in the Transportation Industries* 188 (1960). See Williams, *Transportation Prices: Their Initiation and Regulation*, 50 Va. L. Rev. 377, 408 (April 1964); Meyer, *Competition, Market Structure and Regulatory Institutions in Transportation*, 50 Va. L. Rev. 212, 229–230 (March 1964). A recent report to Congress on this issue concluded that "the role of value of service in rate-making needs to be re-evaluated * * * [T]he growth of competition raises very difficult questions concerning the importance of value of service factors and the degree to which they should and can be taken into account." Senate Commerce Committee, *National Transportation Policy*, S. Rep. 445, 87th Cong., 1st Sess., 416 (the Doyle Committee Report).

needed, rather, is an "orderly transition from a justifiable past practice to one that recognizes and gives effect to the exigencies of the present." See statement of J. M. Johnson, Acting Chairman of the Commission, Hearings on H.R. 6141 before a Subcommittee of the House Commerce Committee, 84th Cong., 2d Sess., 261 (1956). In the absence of Congressional action, the problem of accommodating the traditional method of pricing transportation services to the competitive conditions which now pervade the transportation industry is one for the Commission, not the courts.

3. We have shown that value of service continues to be an important factor in the classification of freight, the establishment of proper rate relationships, and the determination of appropriate minimum rate levels. It may be argued, however, that an all-commodity rate—even one which applies to straight carloads and undercuts all existing commodity rates—is not *necessarily* in derogation of Section 1(6). Suppose, for example, that a proponent railroad were able to show that competing motor carriers, regulated or unregulated, had established a rate much lower than its own and applicable indiscriminately to all commodities; and that the competitive considerations which necessitated the reduction as to any one commodity were paralleled by similar considerations as to every other. In such a situation, the Commission might be urged to conclude that variations among the commodities in other transportation characteristics (*e.g.*, price, density, cost of handling, etc.) were overshadowed by the single feature all had in common: the

magnetic attraction exerted upon each of them by the motor carrier's all-commodity rates.

There is some evidence of this type in the present case. The New Haven attempted to show that its proposed all-commodity rates are necessary to meet the intense competition offered by the Plan III TOFC (trailer-on-flat-car, or "piggy-back") rates instituted in recent years by other Eastern railroads. Those rates cover the movement between rail ramp yards of flat cars carrying one or two trailers, owned or leased by the shippers; and are based on a flat charge per trailer, irrespective of its contents (R. 61–62). To be sure, the TOFC rates, unlike those proposed by the New Haven, are subject to a mixing rule requiring that the lading consist of at least two commodities, no one of which shall exceed 60 percent of the total volume of the lading. But the New Haven argues that no such mixing rule can feasibly be applied to its proposed all-commodity rates if they are to attain competitive parity with the TOFC rates. The TOFC mixing rule, they point out, is satisfied whenever two straight trailerloads, each containing a different commodity, are tendered at the same loading platform under a single bill of lading, even though they may be consigned by different shippers and destined for different consignees (R. 62). We intimate no view as to the merits of these contentions or as to whether the evidence adduced by the New Haven might suffice to vindicate the proposed classification. This question is not one which the Court should be called upon to consider in the absence of findings by the Commission, and since the Commission did not address itself to these considerations in its original order, it

should be given the opportunity to do so upon remand.[10]

The Commission might also deem it appropriate upon remand to consider whether the proposed classification is sufficiently discriminating with respect to those transportation characteristics which go to the cost, rather than value, of the transportation service (*e.g.*, density, cost of handling, liability for damage, perishability, etc.). The court below pointed out (R. 43–44) that the rate in issue "is not what the layman would call 'all-commodity' * * *. [I]t is graduated according to minimum weight per car, denser items thus paying less per hundred pounds as has always been true; it excludes perishables, easily damaged goods, explosives, and other such goods whose cost of handling might be extreme; it applies only to freight westward; and there are other exclusions on basis [*sic*] of cost of shipment and handling." We doubt that these relatively few exclusions could alone make "reasonable" the inclusion of several thousand different commodities in a single rate category. Again, however, this is a matter not discussed in the Commission's report; to the extent that cost factors may be relevant even in the competitive circumstances here presented, the Commission should have an opportunity to make appropriate findings upon remand.

Finally, it would be open to the Commission upon remand to consider the validity of the proposed rates

[10] In that connection, the Commission may consider the changed circumstances which now enable the New Haven to meet TOFC competition by offering its own TOFC service. At the time the rates at bar were filed, the New Haven was unable to offer such service on those routes because of various technical obstacles, which were removed by the end of 1959 (R. 11).

under other provisions of the Act, and, in particular to determine whether they constitute a "destructive competitive practice" within the meaning of the National Transportation Policy. This issue was touched upon in the order set aside by the court below. There the Commission concluded (R. 15) that, since the proposed rates would apply to thousands of commodities "without relation to classification principles, and without regard to the destructive effect * * * upon just and reasonable rate structures" and would "break down these rate structures to the detriment of carriers and shippers alike," they "must be condemned as constituting a destructive competitive practice in contravention of the national transportation policy * * *." Appellant motor carriers contend that this holding constitutes a self-sufficient ground for disallowing the rates and was fully supported by the Commission's further finding, elsewhere in the report (R. 12), that in the period during which its all-commodity rates were in effect, the New Haven "moved over 4 million pounds of additional traffic in return for $129 in added revenue. This represents less than one-third of a cent in revenue for each additional 100 pounds of traffic moved." Thus, the motor carriers argue, "[t]he unchallenged findings of the Commission were that the considered all-freight rates will reduce rather than increase the net revenues of the proponent railroads * * * constituting thereby the very type of destructive competitive device which was condemned by the Supreme Court in *United States* v. *New York, New Haven & Hartford RR Co.*, 372 U.S. 744 (1962) (App. Br. 14–15). The court below, on the other hand, ruled (R. 46) that since the rates are "admittedly compensatory" and were not found to destroy

or impair the inherent advantages of any other mode of transportation, the "finding of destructive competition is not adequately supported on the present record."

We agree with appellants that a finding that the proposed rates would have a negative effect upon the New Haven's net revenues would probably be enough to support a finding of destructive competition. In the absence of extraordinary circumstances,[11] a rate adjustment which diverts traffic from a competitor without benefit to the proponent, and which thus depletes the revenues of the national transportation system as a whole, is difficult to reconcile with the objectives of the National Transportation Policy.

However, the Commission's condemnation of the rates here as a "destructive competitive practice" was not based on that reasoning. Rather, it rested on the ground that the rates wholly disregarded classification principles and would undermine the New

[11] A rate so low as to be hurtful both to competing carriers and to the proponent itself is often regarded as the prototype of a destructive competitive practice. The New Haven's proposed all-commodity rates, however, would admittedly exceed out-of-pocket costs; it is only the change of rate (*i.e.*, the difference in revenue effect between the proposed rates and the pre-existing rates) which is said to be detrimental to the New Haven. We express no view at this time as to whether a rate change which does not benefit the proponent would invariably constitute a destructive competitive practice. We note, however, that where a rate is initially fixed at a level which touches the upper limits of reasonableness and is not essential to the profitability and efficiency of the carrier's overall operation, the Commission might be justified in concluding that a competitive reduction, even though found to be disadvantageous to the carrier, should be permitted for the benefit of shippers. See Section 15a(2), which admonishes the Commission to consider the need for "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service * * *."

Haven's rate structure; in short, the holding as to destructive practices was merely an adjunct to the Commission's ruling that the rates violated Section 1(6). The Commission made no attempt to relate the holding to its earlier comments concerning the revenue effects of the proposed adjustment. Indeed, it drew no conclusion of any kind from those comments—not even the conclusion that the rates had resulted in a net loss of revenue during the period of their use. The Commission's report was addressed almost exclusively to questions of rate relationship and scarcely at all to questions of rate level. In these circumstances, we believe the Commission's conclusion on the "destructive competitive practice" issue cannot be sustained as an independent basis for disallowing the rates, in the absence of additional findings.

CONCLUSION

Accordingly, the judgment below should be reversed and the case remanded to the Commission for further proceedings.

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